FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 324.

A/S TIDEMANS REDERI "CUZCO", as owner of the Norwegian Steamship "TOLUMA",

Petitioner,

—against—

Steamship "SUCARNOCO", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS, WEST INDIA OIL COMPANY, ET AL.

D. ROGER ENGLAR,
Counsel for Respondents.

LEONARD J. MATTESON,
Of Counsel.

INDEX.

PAGE

Statement of the Case 1

The Issues Involved 3

POINT I—Cargo's contributions in general average are a part of Cargo's collision damage, and should be dealt with in the same manner as physical damage 6

POINT II—The petitioner's argument is contrary to the stipulated facts and to the fundamental principles of general average. Although the petitioner has stipulated that the expenses in controversy were properly allowed and collected in general average its argument is based on the assumption that these expenses were incurred by the shipowner for its own account pursuant to its general duty as carrier and bailee 17

POINT III—The damages of "Toluma" cargo do not arise from the Jason Clause in the "Toluma" bill of lading and that clause has no bearing on the claim against the "Sucarseco" excepting as it tends to minimize the damages flowing from the tortious act of the "Sucarseco" 28

POINT IV—The general average nature of the expenses here in controversy is not derived from the Jason Clause but exists quite independently of that clause. In any event a third party tort feasor is not concerned with this question but only with the question whether the expenses were reasonably incurred to save the cargo from greater loss 42

POINT V—The judgment of the Circuit Court of Appeals should be affirmed 50

TABLE OF CASES CITED:

PAGE

Atlas, The, 93 U. S. 302.....4, 10

Bank of St. Thomas v. *Julia Blake & Cargo*, 107 U. S. 418 26
Barnard v. *Adams*, 10 How. (U. S.) 270..... 26
Burton v. *English*, 12 Q. B. D. 218..... 23

Carron Park, The, 15 Prob. Div. 203.....32, 33, 34, 46
Chattahoochee, The, 173 U. S. 540.. .....4, 5, 6
Chrystal v. *Flint* (*The Irrawaddy*), 82 Fed. 472..32, 33, 47
Corning, The, 1928 A. M. C. 1495..... 12

Energia, The, 56 Fed. 124..... 7
Energia, The, 61 Fed. 222 (affirmed 66 Fed. 604), 6, 7, 8, 9, 11, 12, 13, 16, 24, 46, 50
Erie & Western Transportation Company v. *City of Chicago*, 178 Fed. 42, 51, 101 C. C. A. 170..... 12

Federal No. 2, 21 F. (2d) 313..... 38

Gratitudine, The, 3 C. Rob. 240.....23, 25
Gray's Harbor Tugboat Co. v. *Petersen*, 250 Fed. 956 12
Gulf Refining Co. v. *Universal Insurance Co.*, 32 F. (2d) 555, certiorari denied 280 U. S. 584..... 26

Insurance Company v. *Brame*, 95 U. S. 754..... 38
Irrawaddy, The, 82 Fed. 472.....32, 33, 47
Irrawaddy, The, 171 U. S. 187.....32, 33, 34, 47
Isis, The, 57 F. (2d) 265..... 29

Jason, The, 178 Fed. 414..... 27
Jason, The, 225 U. S. 32.....28, 35, 37

Maggie Hammond, The, 9 Wall. 435..... 36
Marpessa, The (1891), Prob. Div. 403..... 11
Milan, The, Lush. Adm. 401..... 10
Minnetonka, The (1905), Prob. Div. 206.....9, 11, 46, 48

PAGE

New York & Cuba Mail Steamship Co. v. *American Steamship Owners Mutual Protection & Indemnity Association Inc.*, 4 F. Supp. 347, reversed in 72 F. (2d) 694; certiorari denied (No. 525 on the calendar) 13
New York, The, 175 U. S. 187..... 4
North Star, The, 106 U. S. 17..... 4

Phoenix Insurance Co. v. *Erie Transp. Co.*, 117 U. S. 312 41
Pool Shipping Co. v. *United States*, 33 F. (2d) 275 .....14, 15, 39

Ralli v. *Societa, etc.*, 222 Fed. 994.....12, 14, 15, 16, 41
Ralli v. *Troop*, 157 U. S. 386.....18, 21, 22, 23, 24, 37, 43, 44
Roanoke, The, 46 Fed. 297..... 18
Robbins v. *Flint*, 275 U. S. 303..... 38

S. S. Willdomino v. *Citro Chemical Co.*, 272 U. S. 718 47
Steel Inventor, The, 16 F. (2d) 306, 24 F. (2d) 657; 43 F. (2d) 958.....13, 14
Sturgis v. *Cary*, Fed. Cas. No. 13,573..... 26

The Andree—The Alexander, 47 F. (2d) 874..... 16

Waubesa, 1928 A. M. C. 1710, 1715..... 12
Western Maid, The, 275 U. S. 419..... 42

AUTHORITIES CITED:

PAGE

Carver, Carriage of Goods By Sea, 7th Edition, Section 698 10
Code de Commerce..... 43
Congdon, General Average, 2nd Edition.....17, 19, 26, 29
Gow, Marine Insurance, 5th Ed.....40, 43
Harter Act, Section 3 (Act of February 13, 1893, U. S. Code, Title 46, Chapter 8, Section 192),
3, 5, 27, 31, 32, 35, 46
Lowndes, General Average, 6th Edition,
17, 19, 26, 29, 43, 44, 45, 49
Maclachlan's Law of Merchant Marine Shipping, 6th Ed. 43
Ordonnance of Louis XIV in 1681..... 44
Phillips, Insurance, Vol. 2, Sec. 1269, page 60..... 43
Rudolf, George R., "The York Antwerp Rules"..... 45
Scrutton, Charter Parties and Bills of Lading, 13th Ed. 26
York Antwerp Rules..... 45

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 524.

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship "TOLUMA",

Petitioner,

—against—

Steamship "SUCARSECO", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases)

WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS, WEST INDIA OIL COMPANY, ET AL.

The opinion of the District Court is printed at page 36 of the record and is reported 4 F. Supp. 344. The opinion of the Circuit Court of Appeals is printed at page 51 of the record and is reported 72 F. (2d) 690.

Statement of Case.

This case arises out of a collision between the Norwegian Steamer "Toluma" and the American Steamer "Sucarseco" on the high seas outside the Virginia Capes, on November 22nd, 1928. Three suits were brought as a

result of the collision: a suit by the owners of the "Toluma" against the "Sucarseco"; a suit by the owners of the "Sucarseco" against the "Toluma"; and a suit by the owners and underwriters of the cargo on the "Toluma" (West India Oil Company *et al.*) against the receivers (in equity) of the owners and operating agents of the "Sucarseco".*

By order of court these suits were consolidated; and the consolidated cause was submitted upon an agreed statement of facts, which included a statement that the collision was due to the joint and equal fault of both vessels (R., pp. 43 to 45).

Both of the vessels were damaged in the collision. The "Sucarseco" was able to continue her voyage. The "Toluma", however, was found to be leaking, and she put back to Norfolk as a port of refuge (R., p. 4). A survey at Norfolk disclosed that the bow plating was damaged and "the collision bulkhead was badly bulged" (see survey reports quoted in Petitioner's Brief, Appendix I, p. 60). A considerable part of the expenses incurred at Norfolk were general average expenses (Stipulation of Facts, R., pp. 29-30, paragraphs 3, 4(a), 5 and 6(b)). It is stipulated that the general average is correctly stated and that the statement may be referred to as part of the record (R., pp. 30-31).

The libel of these respondents against the "Sucarseco" was filed to recover two types of damage: (a) physical damage caused by the extra handling at Norfolk, where the cargo was discharged and reloaded in order to permit repairs to the "Toluma"; and (b) the contribution which the "Toluma" cargo had paid to the general average expenses incurred at Norfolk.

---

* Respondents originally filed a libel in rem against the "Sucarseco" in the District of New Jersey, but as a matter of convenience it was agreed that this suit should abide the event of a libel in personam filed in the Southern District of New York where the cross actions between the vessel owners were pending. It is this suit in personam which is brought up in the present proceeding.

The District Court held that these respondents were entitled to recover the amount of the physical damage to cargo; but that they had no direct right of action against the "Sucarseco" for their general average contributions.

The Circuit Court of Appeals reversed the decision of the District Court, and held that these respondents were entitled to recover in full from the "Sucarseco", not only in respect of the physical damage to the cargo but also in respect of the contributions which the cargo had paid in general average.

The Issues Involved.

The case presents a very simple issue which may be stated as follows:

> Where cargo becomes liable to contribute in general average to losses and expenses incurred to minimize the damages resulting from a marine disaster, may the cargo owner recover the amount of this contribution as part of his damages, from one whose fault caused or contributed to the disaster?

In following the petitioner's argument it is important to bear constantly in mind the relationship of the parties to this litigation. These respondents never brought any suit against the petitioner, and admittedly have no cause of action against the petitioner. Excepting for the very elastic and informal procedure in the admiralty courts, the petitioner and the respondents would not even be parties to the same litigation. Under Section 3 of the Harter Act (Act of February 13, 1893, U. S. Code, Title 46, Chapter 8, Section 192) the "Toluma" is exempt from liability to her own cargo for any loss or damage arising from the collision. The "Sucarseco", however, is liable for any damage to the cargo of the "Toluma". Even where both vessels are at

fault the cargo owners, to whom no fault is imputable, may recover in full from the non-carrying vessel. *The Atlas*, 93 U. S. 302; *The New York*, 175 U. S. 187, 209. The owners of the "Toluma" cargo, therefore, are entitled to recover their full damages from the "Sucarseco"; and the only question involved, as between these interests, is whether the cargo's contribution to general average is a part of its damages arising from the collision. That the expenses here in controversy were, in fact, items of legal damage caused by the collision is stipulated (R., p. 28, paragraph 2). Moreover, as between the "Sucarseco" and the "Toluma" cargo, the "Sucarseco's" liability for cargo's share of these expenses is not disputed. The objection to the claim of the respondents is not made by the "Sucarseco", against which the claim was prosecuted, but by the "Toluma", against which the respondents have no claim whatever. This somewhat anomalous situation results from the rules governing the division of collision damages where both vessels are at fault.

In the case of *The North Star*, 106 U. S. 17, this Court held that where two vessels are at fault for a collision the resulting liability between them is for a single sum obtained by striking the balance between them on the principle that each shall bear one-half of the total damages resulting from the collision, that is, there is a single liability in favor of the vessel sustaining the greater loss and against the vessel sustaining the lesser to pay the balance after the damages have been added together and divided.

In *The Chattahoochee*, 173 U. S. 540, 554, 555, this Court held that where damages have been awarded to the owners of cargo against the non-carrying vessel, the owners of the non-carrying vessel are entitled to recoup one-half of the sum so awarded from the carrying vessel when the balance is struck for the purpose of determining the single

liability between them upon the principle of an equal division of damages; and that the method of striking the balance between the vessel owners is not affected by the provisions of the Harter Act, exonerating the carrying vessel from direct liability to its cargo for the cargo damage.

Under the rules above set forth, it follows that the amount of the "Sucaresco's" ultimate contribution to the total damages is not affected by the question whether or not the "Toluma" cargo is entitled to recover its share of the general average. If the "Toluma's" cargo recovers its claim in full, the "Sucarseco" will recoup one-half of this claim from the "Toluma". If, on the other hand, the "Toluma" succeeds in its contention that cargo has no direct right against the "Sucarseco", but is only entitled to its pro rata share of any recovery by the "Toluma", then the "Toluma" will recover one-half of the general average expenses from the "Sucarseco". In other words, the question presented to this Court does not affect the share of the loss ultimately borne by the "Sucarseco", but does affect the share ultimately borne by the "Toluma".

Upon analysis it will be found that much of the petitioner's argument has to do with the apportionment of damages between the two vessels, in determining the ultimate single liability pursuant to the rule laid down by this Court in the case of *The Chattahoochee, supra*. It is suggested that the liability of the "Sucarseco" to the "Toluma" cargo is affected in some way by the fact that half of the recovery by cargo can be offset by the "Sucarseco" against the claim of the "Toluma". We submit that all of this discussion is entirely irrelevant. The liability of the "Sucarseco" to the cargo of the "Toluma" is not dependent upon and cannot be affected by the principles which govern the adjustment of damages as between the "Sucarseco" and the "Toluma". These rules of adjustment do not come into play until the liability of the "Sucarseco" has been established; they have no bearing on the liability but only govern the

final apportionment of damages between the two vessels. Such was the decision of this Court in *The Chattahoochee, supra.*

We submit, therefore, that this Court is not concerned here with any recourse the "Sucarseco" may have against the "Toluma" or others; but only with the simple question whether a contribution by cargo in a general average rendered necessary by a collision is recoverable as part of the collision damages. This question was answered in the affirmative, both here and in England, many years ago, and these decisions have long been accepted as establishing the law in both countries.

POINT I.

Cargo's contributions in general average are a part of Cargo's collision damage, and should be dealt with in the same manner as physical damage.

The right of cargo owners to recover general average contributions as part of their collision damage was upheld more than forty years ago by Judge Addison Brown in the Southern District of New York and, on appeal, by the Circuit Court of Appeals for the Second Circuit. Until very recently the rule as then laid down has been accepted as settled law. The rule in England is the same. The decision of the District Court in the present case was the first decision in which any court has ever denied the right of cargo owners to include general average contributions among their damages recoverable from the non-carrying vessel.

In the case of *The Energia*, 61 Fed. 222 (affirmed 66 Fed. 604), the steamship "Energia", outward bound from New York to Shanghai, China, collided with the schooner "Wild Pigeon" in the Lower Bay. The "Energia" sustained damage and returned to New York for repairs, just as the

"Toluma" returned to Norfolk in this case. General average losses and expenses were incurred in this connection and the "Energia" after completing repairs continued her voyage and arrived at her destination at Shanghai. There cash deposits were required from the various cargo interests to cover their share of general average and special charges. After preparation of the usual adjustment, cargo's share of these charges was paid out of these deposits. The cargo interests brought suit against the "Energia" at New York *to recover their damages resulting from the collision*, including the general average and special charges exacted from the cargo upon adjustment at Shanghai. The court had previously found that the "Energia" was solely at fault for the collision and liable for the collision damage (*The Energia*, 56 Fed. 124). The case arose prior to the enactment of the Harter Act, and the court held that the cargo interests could properly maintain an action against the carrying vessel for damages resulting from the collision under the law as it then existed. *The action was solely in tort, and not on the contract of affreightment.* On appeal, the Circuit Court of Appeals gave special consideration to the question of the right of the cargo interests to recover from the vessel, *as collision damage*, the general average and special charges exacted from the cargo upon adjustment at Shanghai. Judge Lacombe, speaking for the court, said (66 Fed. 604, at p. 608):

> "It only remains to consider the claim to be reimbursed for the general average and special charges exacted from the cargo upon adjustment at Shanghai. Upon this branch of the case, we concur in the reasoning and conclusion of the district judge, as expressed in the following excerpt from his opinion:
>
> *'I do not perceive any sound reason, in justice or in common sense, why both the general and the particular average charges, to which the residue of the cargo is legally subject in Shanghai, should*

not enter into the damages to be recovered for this collision. The Rule of damages here is "restitutio in integrum" (The Potomac, 105 U. S. 630); and this rule as plainly demands compensation for a charge or expense lawfully imposed upon this sound part of the cargo as for a deterioration or physical injury to another part, when both are equally the direct results of the collision. The loss to the cargo owner is alike in both, and both, upon the stipulated facts, are alike the direct and natural consequence of the collision. It is immaterial that the charge or expense in dispute has to be paid at Shanghai, instead of here, or that it is payable to the shipowner who is in fault, so long as the charge is a lawful one where it arises. If the exaction were an illegal one, no claim for it would arise here, for then it would not be the proper and natural result of the collision, but of a new agency, and an independent wrong, for which an independent remedy must be sought. But by our law, as well as by the English law, all average charges for the voyage are to be determined and adjusted by the law of the place of destination, which in this case was Shanghai, governed by English law. From the moment of collision, therefore, the sound part of the cargo became liable to these average charges, should it ever reach its destination; and, as that destination has been reached, that item of damage has become fixed, and is therefore recoverable here, as one of the direct and necessary legal results of the collision.' **61 Fed. 223.**

The appellant contends that this conclusion is fallacious, because general average contribution neither arises by the collision nor while in the port of New York, but is the striking of a balance of the entire transactions of the voyage, and is therefore only recoverable at the place of destination, where vessel and cargo are finally separated. This criticism, however, is without force in the case at

bar. All the average charges, both general and special, were for expenses incurred as a direct consequence of this collision, unaffected by any of the subsequent transactions of the voyage. The circumstance that they were collected from the cargo only when the voyage was terminated is immaterial. The 'contribution' between the various interests—ship, freight, and cargo—may, indeed, be said to arise only when a process of adjustment has determined the amount to be paid by the respective shares. *But the necessity of paying out money in order to enable surviving cargo to secure transportation to its original destination in the vessel by which it was shipped arose here. Whether it was paid here in the first instance by the cargo owner himself, or was paid by the shipowner who thereafter repaid himself out of the cargo owner's goods, it was equally an expense which was the necessary result of the collision; it 'arose' at the moment of collision; and it is immaterial when it was paid.*" (Italics ours.)

The general average charges borne by cargo in the present case, for which recovery is sought by the cargo interests, were likewise the necessary result of the collision (Stipulation of Facts, R., p. 28, paragraph 2) and fall squarely within the principles above stated.

The same rule was laid down in England in 1905 by the Court of Appeal in the case of *The Minnetonka* (1905) Prob. Div. 206.

The facts of the case presented in *The Minnetonka,* and the decision, are so significant in considering the questions raised by the "Toluma" here, that we believe that decision is entitled to very careful consideration.

The circumstances in the case of *The Minnetonka* were that a collision had occurred between a collier named the "Uskmoor", laden with a cargo of coal, and the "Minnetonka", as a result of which the "Uskmoor" had been

compelled to return to port for repairs. It was then apparent that it would be necessary to discharge, store and reload the cargo as well as incur substantial delay if the "Uskmoor" were to carry her cargo to destination. The expenses of discharging, storing and reloading would be apportioned in general average and the cargo would have to bear a substantial portion thereof in addition to paying freight for the voyage if completed. In order to avoid this expense the Admiralty, which was the owner of the cargo, entered into a compromise by which it was agreed that the Admiralty would pay to the owners of the "Uskmoor" a sum somewhat less than the estimated amount of what cargo's contribution in general average would be if the voyage were completed, in consideration of which the shipowner gave up his right to complete the voyage and earn the freight. The Admiralty then brought suit against the "Minnetonka" to recover the cargo damages resulting from this collision and the question presented to the court was whether or not the sum paid by the Admiralty in compromise of, and as a substitute for, prospective general average charges was an element of damages which could be recovered from the "Minnetonka". The court found both vessels at fault, and held that the sum so paid was a proper item of cargo damage.

Clearly the Court considered that if the voyage had been continued and the general average expenses incurred, the Admiralty, as owner of the cargo, would have been entitled to recover a moiety (under the English rule*)

---

* The English rule, of course, differs from the American rule as to the liability of the non-carrying vessel for damage to cargo in collision cases. In the English admiralty courts the liability of a colliding vessel, even to innocent cargo, is only in proportion to fault. See Carver on Carriage of Goods by Sea, Seventh Edition, Section 698, pages 966 to 969. See also The Atlas, 93 U. S. 302, 317, where this Court declined to follow the English rule as laid down in the case of The Milan, Lush. Adm. 401.

of its contributions to those charges from the "Minnetonka", for it would be absurd to say that the Admiralty could not recover its contributions in general average but could recover a sum paid in compromise of, and as a substitute for, those general average contributions.

As against the decision in *The Minnetonka*, the petitioner cites the earlier English case of *The Marpessa*, (1891) Prob. Div. 403. This was a decision by a court of first instance, and was never appealed. When it was cited to Judge Brown in the case of the *Energia*, *supra*, he said, "* * * I confess myself not satisfied with the reasoning or the decision in the case of the *Marpessa*" (61 Fed. at p. 223). In the case of *The Marpessa*, cargo had been jettisoned, after a collision, and the carrying vessel had contributed, in general average, to this sacrifice. The carrying vessel then sought to recover from the non-carrying vessel the amount of this contribution, as part of the collision damages. It was held that this item was not recoverable. How this decision supports the petitioner's argument is not apparent to us. The suit was by the shipowner, not by the cargo owner. So far as the case is material in the present litigation, it would seem to support an argument that the expenses in controversy here are not recoverable from the "Sucarseco" at all,—either by the "Toluma" or by her cargo. In all fairness, we think it must be conceded that the *Marpessa* decision has been overruled by the decision of the Court of Appeal in the *Minnetonka*. However, if the *Marpessa* and the *Minnetonka* were to be regarded as consistent with each other, the result of the two cases is exactly contrary to appellee's contention. The combined effect of the two decisions would seem to be that general average expenses are recoverable by cargo but not by the carrying vessel.

The rule laid down in *The Energia* has been repeatedly stated and applied by the courts.

In *Ralli* v. *Societa, etc.*, 222 Fed. 994, 999 (S. D. N. Y.), Judge Mayer said:

> "Under our law general average contributions are regarded as part of the damage. *The Energia* (D. C.), 61 Fed. 222, affirmed 66 Fed. 604, 18 C. C. A. 653; *Erie & Western Transportation Co.* v. *City of Chicago*, 178 Fed. 42, 51, 101 C. C. A. 170."

In the case of *Erie & Western Transportation Company* v. *City of Chicago*, cited in the above quotation, the rule of *The Energia* was adopted by the Circuit Court of Appeals for the 7th Circuit.

In *Gray's Harbor Tugboat Co.* v. *Petersen*, 250 Fed. 956, 959, the same rule was adopted by the Circuit Court of Appeals for the 9th Circuit.

In *The Corning*, 1928 A. M. C. 1495, 1497, the same rule was applied by a Commissioner of the United States District Court for the Southern District of New York. At the page last cited, the Commissioner said:

> "General average expenses are properly chargeable to the collision. *Corning, supra; Energia*, 61 Fed. 222, affirmed 66 Fed. 604; *Erie & Western Transportation Co.* v. *Chicago*, 178 Fed. 42; *Ralli* v. *Societa Anonima, etc.*, 222 Fed. 994; *Gray's Harbor Tugboat Co.* v. *Petersen*, 250 Fed. 956.
>
> The rule is too well established, both in reason and in authority, to justify the consideration by the District Court, or its Commissioner, of authorities in foreign jurisdictions."

See also:

Waubesa, 1928 A. M. C. 1710, 1715, 1716.

The manner in which the rule of *The Energia* has been accepted commercially is well illustrated in the case of

the *New York & Cuba Mail Steamship Co.* v. *American Steamship Owners Mutual Protection & Indemnity Association, Inc.*, 4 F. Supp. 347. There also, both vessels were at fault. It appears from the opinion that the recovery in that case was distributed on the theory that cargo had a direct claim against the non-carrying vessel for the amount of cargo's general average contributions; and these contributions were paid to the cargo in full out of the recovery. The recovery was in the hands of the shipowner, and the distribution was made by adjusters employed by the shipowner. We quote as follows from the opinion of the District Court:

> "The libellant then treated the payment of $44,274.31 made by the *Hamilton* as including $28,729.94 for the *Mexico's* cargo, this figure being made up of cargo's contribution in general average in the sum of $28,659.12 and direct damage to cargo in the sum of $70.82. The theory of the adjustment was that the *Mexico's* cargo had had a direct claim against the *Hamilton* (asserted by the libellant as bailee of cargo) for this $28,729.94, and that one-half of this amount $14,364.97, had been allowed to the *Hamilton* against the *Mexico* as part of the former's damage" (p. 347).

The decision of the District Court in that case was rendered by the same judge and at the same time as the decision in the present case; but the case was reversed by the Circuit Court of Appeals on other grounds, so that the point involved here was not considered in that court. 72 F. (2d) 694. This Court later denied *certiorari* (525 on the calendar of this Court). We cite the case not for the decision but merely as showing the practice of experienced adjusters based on the rule of the *Energia*.

Another interesting case in this connection is the case of the *Petition of United States Steel Products Company*

(*The Steel Inventor*), 16 F. (2d) 306. Judge Hough there said:

> "For present purposes it may be assumed that the petitioner and all the other persons and corporations enumerated possess whatever rights they do possess as the owners of cargo laden upon the 'Steel Inventor'. *This is said, because I think it makes no difference whether the claims sought to be propounded are for general average charges or not; the right in which every claim must be advanced is that of a cargo owner; it is only as cargo owners that these people have any rights at all.*" (Italics ours.)

This case went twice to the Circuit Court of Appeals, 24 F. (2d) 657; 43 F. (2d) 958. That court first upheld the right of the cargo interests to intervene; but later dismissed their claim on the merits. The importance of the case for our present purpose is that the damages were fixed in accordance with Judge Hough's ruling as above quoted; and this ruling was never disputed during the later stages of the case, although it appears from the record that most of the admiralty lawyers in New York City were interested in the case in one capacity or another.

As opposed to the authorities above cited, there is not a single decision which lends any support to the petitioner's theory. The cases of *Pool Shipping Co.* v. *United States*, 33 F. (2d) 275, and *Ralli* v. *Societa Anonima, etc.*, 222 Fed. 994, have no bearing whatever on the present case. This is pointed out in the opinion of the Circuit Court of Appeals as follows:

> "The idea that the liability of the non-carrying ship, when at fault for a collision, to cargo on the carrying ship, is secondary, may be due in part at least to some reference to the position of cargo as that of a surety or insurer in *Pool Shipping Company* v. *United States* (C. C. A.), 33 F. (2d) 275,

where the right of the carrying ship to recover as bailee of the cargo was sustained, but that language is not to be torn from its context and given general application. Nor is there anything contrary to our conclusion here in *Ralli* v. *Societa Anonima, etc., supra,* where the carrying vessel jointly at fault for the collision had been credited with one-half of the general average contributions in the division of damages between the ships and was required to account to its cargo for this credit" (R., p. 55).

The *Pool Shipping Company* case merely held that the owner of the carrying ship may recover as bailee of the cargo, just as the owner of cargo could recover in a separate action.

The *Ralli* case merely held that where the carrying vessel sues the non-carrying vessel and is credited, after a finding of mutual fault, with any part of the general average contributions paid by cargo, it must account to cargo for such recovery. It follows naturally that the obligation to account is only to account for what has been received. In that case the carrying vessel, the "Aristea", had been held jointly at fault, and liable for one-half of the total damages resulting from the collision. The owners of the "Aristea" included in their statement of their own damages the amounts which they had expended for items of a general average nature, apparently without disclosing the fact that these items had been the subject of contribution in general average. The owners of the "Aristea" had, therefore, been credited with 50% of the general average items and were held accountable to the cargo interest *for its proportion of this credit.* The reason why the shipowner had only recovered one-half of the general average contributions clearly appears from the facts stated in the opinion. The collision had occurred in British waters and the collision suit had been tried in the British courts. Accordingly, the rights of the parties growing out of the

collision were governed entirely by British law. Under British law, of course, the liability of a vessel for collision damages is proportional to her fault, even as against innocent cargo. (See footnote on p. 10, *supra.*) The cargo interests, therefore, recovered exactly the same amount which they would have recovered if they had brought an independent suit against the non-carrying vessel in the British courts.

The case of *The Andree-The Alexander,* 47 F. (2d) 874, stands on the same footing as *Ralli* v. *Societa Anonima, etc.*, excepting that it was not complicated by the application of any foreign law. In the *Andree-Alexander* case the only claim of the libellants was to share in a recovery which had been effected by the carrying vessel from the non-carrying vessel. The extent of the non-carrying vessel's liability had been the subject of a previous litigation which had been compromised on the basis of the non-carrying vessel paying 90% of the damages. All of the parties to the later litigation (to which the petitioner refers) had been parties to the earlier litigation against the non-carrying vessel, and had agreed to the settlement. Accordingly, the question involved in the present case was not even remotely involved in the *Andree-Alexander* case. The amount of the recovery was fixed and the only question was whether certain lienors were entitled to share in that recovery. The fact that the case is cited at all merely shows what straws the petitioner is forced to grasp in an effort to find some authority for its position.

We submit that a rule as long established as the rule laid down in the *Energia,* which has been so uniformly accepted for many years by persons interested in maritime affairs, should not lightly be set aside. We think the present is a typical case for the application of the rule of *stare decisis.*

POINT II.

The petitioner's argument is contrary to the stipulated facts and to the fundamental principles of general average. Although the petitioner has stipulated that the expenses in controversy were properly allowed and collected in general average its argument is based on the assumption that these expenses were incurred by the shipowner for its own account pursuant to its general duty as carrier and bailee.

Certainly if there is any single fact in the present case which may be considered fundamental, it is the fact that the expenses which the respondents seek to recover from the "Sucarseco" were general average expenses. This fact has been stipulated (R., pp. 29-30, paragraphs 3, 4a, 5 and 6b). Nor did the petitioner stipulate this fact without ample reasons. Petitioner had collected cargo's share of these expenses from the respondents on the sole ground that they were general average expenses. Excepting as general average expenses the petitioner could not have claimed any share of them from the respondents, and the respondents would have been under no obligation to contribute to them.

As the Circuit Court of Appeals well said:

> "Since it is agreed that all of the contributions were of a general average nature in settlement of expenses properly includable in the average adjustment, we need not now pay further attention to that phase of the matter" (R., p. 54).

For a detailed discussion of the reasons why port of refuge expenses are considered to be of a general average nature, we refer to Lowndes, General Average, 6th ed., pages 221, etc., and Congdon, General Average, 2nd ed., pages 122, etc. It is sufficient for the purposes of this dis-

cussion to point out that these expenses are deemed to be the result of the decision of the master to seek a port of refuge in order to avert a total loss; a decision which, of course, necessarily involved a considerable expenditure on the part of all interests. As the "Toluma" was leaking, and it was dangerous for her to proceed, it was admittedly good judgment on the part of the master to seek a port of refuge. The necessary expense of this action is regarded as resulting from the master's decision. Thus, in *Ralli* v. *Troop*, 157 U. S. 386, at page 407, this Court quoted with approval from a note by Mr. Justice Shee to Abbott on Shipping, as follows:

> "Expenses voluntarily and successfully incurred, *or the necessary consequences of resolutions voluntarily and successfully taken*, by a person in charge of a sea adventure, for the safety of life, ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them, give, the ship being saved, a claim to general average contribution." (Italics ours.)

In the same opinion (at p. 413) this Court quoted the following passage from the opinion of Judge Jenkins in *The Roanoke*, 46 Fed. 297, 299:

> "The master must be presumed to have designed the consequences necessarily resulting from the act directed."

When the master of the "Toluma" made the decision to put back to Norfolk, he, of course, knew that this act would subject both ship and cargo to various liens and charges for disbursements which would necessarily be incurred there. By his act, therefore, he sacrificed a part of the value of all the interests involved in the adventure. This sacrifice was justified by the fact that the expense incurred at Norfolk presumably saved both the leaking vessel and her cargo

from total loss. Some of the expenses at Norfolk were, of course, special charges on particular interests; the repairs to the vessel, for example, were for the shipowner's account. A very substantial part of the expense, however, was of a general average nature. It is agreed by all that the apportionment of the expenses in this case has been duly and properly made (R., p. 30, paragraph 6 (b)) and that all the expenses which are the subject of this controversy were "caused by the collision" (R., p. 28, paragraph 2).

There is nothing unusual or extraordinary about the general average expenses in the present case. Port of refuge expenses are one of the most common types of general average expenditures in modern practice, as can readily be confirmed by reference to the leading text books on the subject (see Lowndes on General Average and Congdon on General Average, cited, *supra*, p. 17).

The character of the expenses incurred or sacrifices made to save the ship and cargo from peril or greater loss is immaterial. On this point Lowndes quotes from a leading English case as follows:

> "It is immaterial whether a shipowner sacrifices a cable or an anchor to get the ship off the shoal, or pays the worth of it to hire those extra services which get her off. *Kemp* v. *Halliday*, 6 B. & S. 723, 746" (Lowndes, General Average, 6th ed., p. 23).

Ordinarily we should consider it unnecessary and improper to deal at such length with a fact which has been stipulated, *i. e.*, the fact that the expenses in controversy were properly allowed and collected in general average. In the present case, however, although it is stipulated that these expenses are of a general average nature, the petitioner's argument necessarily involves the contrary assumption.

The District Court, which adopted the petitioner's argument, made the following statements which clearly disclose the error underlying its decision (R., pp. 38-9):

> "Where the *damage to hull* is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary.
>
> * * * * * * * * *
>
> "From these views it must follow that the cargo owner whose goods have not been injured but who has paid contribution in general average toward making good *the loss suffered by his carrier* in a collision with another vessel in which both vessels were guilty of negligent navigation has no direct right of action against the other vessel. His only basis of recovery against the other vessel is by subrogation to the right of the carrier." (Italics ours.)

If the cargo owners had contributed to the "damage to hull" of the "Toluma", as suggested in the above quotation, there would be great force in the argument that such a contribution was a private matter between the hull and cargo of the "Toluma", with which the "Sucarseco" was not concerned. Such damage, however, is obviously not a subject of general average contribution. Contribution in general average is due not in respect of any damage sustained either by hull or cargo in the collision; but is due only in respect of sacrifices or expenses *voluntarily* incurred by the master, as the representative of all interests, *after the collision has occurred and for the sole purpose of averting further loss.*

The Circuit Court of Appeals rejected the argument which had prevailed in the District Court and pointed out the obvious fallacy which it involved. In this Court the

petitioner has modified its argument and has endeavored to state its position in such a way as to avoid conflict with the stipulated facts. This, however, has proved an impossible task. Repeatedly throughout its brief the petitioner speaks of the expenses in controversy as though they constituted a damage sustained by the shipowner in which the cargo had no direct interest. In connection with the passages quoted above from the opinion of the District Court, we quote the following passage from page 58 of the petitioner's brief:

> "If by reason of the special contract between the carrying vessel and its cargo, the cargo by contract *pays to the carrying vessel certain portions of the damages sustained by the carrying vessel*,* it is only right and equitable that the cargo paying such items by contract should be reimbursed by the carrying vessel to the extent (only) of a *ratable* share of the recovery made from the non-carrying vessel for these items."

In considering the petitioner's argument, therefore, it becomes necessary to inquire into the nature of general average sacrifices and expenditures. By whom and in what capacity, and for whose account are they made? Do they constitute a damage suffered only by those who made them in the first instance; or are they made for account and at the expense of all the interests in the adventure? The text books and other authorities dealing with general average are very ancient and very voluminous. On the other hand, the principles involved here are few and well settled. We believe that they are all sufficiently covered in the opinion of this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386, to which we have already referred. In that case this Court discussed the basic principles of general average at some length, and with numerous citations of authority. We think it is

---

* Italics ours.

unnecessary for us to go outside of that opinion for a statement of the principles upon which we rely. We believe that the law of general average, so far as material to the present case, is summarized in two sentences which we will quote from the opinion of this Court in *Ralli* v. *Troop*:

> "In the earliest case in this court, Mr. Justice Story, in delivering judgment, stated the leading limitations and conditions, as recognized by all maritime nations, to justify a general contribution, as follows: 'First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained.' *Columbian Ins. Co.* v. *Ashby*, 13 Pet. 331, 338" (157 U. S., p. 394).
>
> * * * * * * * * *
>
> "There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made *for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them.*" (157 U. S., p. 403.) (Italics ours.)

We call particular attention to two principles laid down in the above quotations. First, that the sacrifice must be a *voluntary* sacrifice, to avert a *common* imminent peril; and, second, that the master, in making the sacrifice acts not merely as a representative of the shipowner, but as the authorized representative of all parties to the adventure. Unless a sacrifice (or expenditure) complies with these conditions it cannot properly be allowed in general average; and it is stipulated that the expenditures here in controversy were properly allowed in general average.

As to the capacity in which the master acts, the opinion in *Ralli* v. *Troop* cites abundant authority. At page 397 this Court quoted the following language from *Burton* v. *English*, 12 Q. B. D. 218, 220, 221:

> "This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done *by the captain as agent, not for the shipowner alone, but also for the cargo owner*, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo." (Italics ours.)

Further down on the same page (397) the opinion continues as follows:

> "Sir William Scott, speaking of the powers and duties of the master, said: 'Though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, *the character of agent and supercargo is forced upon him*, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter.' He illustrated this by the case of jettison to be contributed for in general average, by the case of ransom, and by the case of sale of perishable cargo in a port of necessity, and added: 'In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed.' *The Gratitudine*, 3 C. Rob. 240, 257, 258, 260." (Italics ours.)

The authorities thus establish that the sacrifices and expenditures incurred to save ship and cargo from a common peril are obligations of the cargo and of the shipowner to the extent of their respective interests. The purpose of the general average adjustment is to ascertain the extent of such interest and thus apportion between the cargo and the ship the sums for which they are respectively liable. The sum for which each is liable is called its contribution in general average. So far as the liability of the non-carrying vessel is concerned, there is no difference between direct physical damage to the cargo and damages which are sustained to avert or minimize a loss. *The Energia* (*supra*). In other words, sacrifices are made and expenditures are incurred to save cargo and the ship from further loss. It is immaterial that these sacrifices have been made or that the expenditures are incurred in the first instance by the master of the ship rather than by the owner of the cargo personally; because in making the sacrifices and incurring the expenditures, the master acts as agent of cargo in so far as cargo is interested. The fact that a general average adjustment is required to determine to what extent cargo is interested, is immaterial. The master binds cargo by his act when he makes the sacrifices and incurs the expenses; for the law makes him cargo's agent in time of peril, and authorizes him to bind cargo to pay its share of the sacrifices and of the expenses. *Ralli* v. *Troop* (*supra*).

In former years it was not uncommon for the cargo owner to send a supercargo on the ship to look after his interests. Surely, if the cargo were placed in jeopardy as a result of a collision, and the supercargo incurred reasonable and proper expenditures to protect it, there could be no question as to the cargo owner's right to recover these expenditures as part of his damage resulting from the collision. How can the result be different, because, pursuant to well-settled custom and usage, the mas-

ter, in time of danger, is charged with the duties of a supercargo?* As appears from the authorities above cited, the master is, under such circumstances, the agent of the cargo owner and authorized to incur expenditures for his account. So long as he acts prudently and properly in the interest of the cargo owner, what possible difference can it make to a third party *tort feasor* that he happens to be the master of the ship as well as the representative of the cargo?

The circumstance that the sums here in controversy were paid out in the first instance by the petitioner is unimportant, since it is clear that these payments were made in a representative capacity. When the petitioner advanced the funds for payment of the port of refuge expenses, it did so on ample security, and was compensated for its outlay both by an allowance of interest on the various items and by a commission on the amount of its disbursements. The shipowner took no risk; it insured the disbursements made at Norfolk pending the arrival of the cargo at destination and the cost of this insurance was allowed to it as a general average expense (Item $250.00, G. A. Statement, p. 93). At destination the shipowner secured from the cargo interests, pursuant to its duty, security either by average agreement with sufficient guarantee (R., p. 31, paragraph 6(c); R., pp. 33-5), or cash deposits, as shown in the average statement. It was allowed interest on its general average disbursements and allowances to the date of the adjustment, plus the period of further probable outlay pending collection, in the sums of $1482.89 and $201.36 (G. A. Statement, p. 135), and compensation consisting of "Commission on General Average disbursements and Advancing Funds at 2½%" in the sum of $707.82 (G. A. Statement, p. 119). It was further allowed "For Commission, Collecting and Settling

* See language of Lord Stowell in The Gratitudine, supra, p. 23.

the General Average at 2½%" the sum of $1099.02 (G. A. Statement, p. 143). These entirely apart from the services of the adjusters (G. A. Statement, p. 141). These items were all credited to the vessel owner in the settlement (G. A. Statement, pp. 179, 181).

The settlement of the accounts arising from a general average sacrifice or disbursement is not only a duty but is also a privilege which may be quite profitable to the shipowner.

Barnard v. *Adams*, 10 How. (U. S.) 270;
Sturgis v. *Cary*, Fed. Cas. No. 13,573;
Gulf Refining Co. v. *Universal Insurance Co.*, 32 F. (2d) 555; *certiorari* denied 280 U. S. 584.

The circumstances above set forth show clearly that the disbursements incurred by the petitioner at Norfolk were not for its own account and consequently shipowner's damages, but were merely advances by the shipowner for account of all interests. This advance was made for a consideration and on ample security, pending allocation to the respective interests and collection from each of its respective share. If the shipowner had not been able, or had not wished, to advance these expenses, the cargo might have been called upon at the time to advance its share, failing which the master might have sold or pledged the cargo to obtain funds to pay the disbursements to enable the vessel to proceed on her voyage—

Bank of St. Thomas v. *Julia Blake & Cargo*, 107 U. S. 418, 426, 427;
Congdon, General Average, 2nd ed., pages 16-17;
Lowndes, General Average, 6th ed., pages 335, *et seq.;*
Scrutton on Charter Parties and Bills of Lading, 13th ed., page 318.

Where the expenses in a port of distress are particularly heavy, it is not unusual for cargo interests to pay their own estimated share in the first instance, instead of relying on the shipowner to act as banker until the amount of the respective contributions can be accurately computed. Surely, the liability of a third party *tort-feasor* cannot depend on the question whether ship or cargo advances, in the first instance, the funds required for the port of refuge expenses.

If the cargo owners themselves had been present and had incurred necessary expenses for the preservation of their cargo, their right to recover such expenses could scarcely be disputed. The same would be true if the master, after disaster, had communicated with them and asked their authority to incur necessary expenses on their behalf to save the cargo. In such a case, as the Circuit Court of Appeals pointed out in *The Jason*, the agreement would be valid even without the Harter Act and without any special provision in the bill of lading. *The Jason*, 178 Fed. 414, at pages 416-17. Why the giving of such authority in advance should alter the legal situation as against a third party, is difficult to understand.

The petitioner apparently would not dispute the cargo owner's right to recover salvage which he was forced to pay to an independent salvor who intervened and acquired a lien on the cargo, for services rendered in saving it from peril after the collision. It claims, however, that because authority to incur expense for cargo's account was given in advance to the master of the vessel (obviously the person best situated to act for all interests) the expense so incurred is not recoverable. This argument is wholly unsupported either by logic or by legal authority.

POINT III.

The damages of "Toluma" cargo do not arise from the Jason Clause in the "Toluma" bill of lading and that clause has no bearing on the claim against the "Sucarseco" excepting as it tends to minimize the damages flowing from the tortious act of the "Sucarseco".

One of the petitioner's principal arguments is that the respondents cannot recover their general average contributions from the "Sucarseco" because their obligation to make these contributions arose from the Jason Clause in the "Toluma's" bills of lading. The Jason Clause derives its name from the fact that its validity was upheld by this Court in the case of *The Jason*, 225 U. S. 32. The clause, as set out in the bills of lading issued in the present case, is as follows:*

> "In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and *shall contribute with the shipowners in general average*

* The first two sentences of Clause 12 of the bill of lading, as set forth on page 4 of petitioner's brief, form no part of the Jason Clause, and have no bearing on the question in issue here. See opinion of this Court in The Jason, 225 U. S. 32, at page 49.

> to the payment of any sacrifices, losses or *expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril,* all with the same force and effect and *to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation* or in the management of the vessel or by any latent or other defect or unseaworthiness" (R., p. 32A). (Italics ours.)

This clause is now almost universally used in ocean bills of lading. The District Court refers to it as "the customary Jason Clause" (R., p. 37). See also Congdon General Average, 2nd ed., page 48; *The Isis*, 57 F. (2d) 265, 269; Lowndes General Average, 6th ed., pages 38, 747.

We call attention to the precise terms of the cargo owner's agreement as set forth in the above clause. He does not agree to pay any part of a loss sustained by the shipowner; nor does he agree in general terms to pay expenses resulting from disaster. His agreement is to "contribute with the shipowners in general average * * * to the same extent as if such * * * danger * * * had not resulted from * * * faults or errors in navigation". In a word, the cargo owner agrees to contribute to any proper general average expenses to which he would be liable to contribute in a case where there had been no negligence in the navigation of the carrying vessel.

The Jason Clause does not even require that the shipowner shall advance the amount of any general average expenses in the first instance, although it undoubtedly contemplates that he may do so.

It is clear from its language that the Jason Clause speaks as of the time when danger has arisen; and when some sacrifice or expenditure is necessary for the common benefit. In such a situation, the cargo owner (speaking in

advance through the Jason Clause) says to the master of the vessel (who alone has authority to perform a general average act)—

> "If you will take whatever steps are necessary for the common benefit, I will pay my share of the expense."

Whether this statement is made by the cargo owner when personally present, or through the medium of a clause in the bill of lading, its effect is the same. *It is not a statement that the cargo owner will pay any part of a loss which the shipowner has already sustained; or any part of the loss with which the shipowner is threatened.* It is a statement that the cargo owner will pay *his own share* of expenses properly incurred for the common benefit.

In this connection, it must constantly be borne in mind that the expenses involved here are stipulated to have been necessitated by the collision, and to have been properly allowed in general average. From these agreed facts it results inevitably that the expenses under consideration were incurred for the common benefit and for the purpose of averting imminent danger resulting from the collision. It was only on this basis that the shipowner could compel cargo interests to contribute to these expenses; and having demanded and received such contribution, the "Toluma" is in no position now to dispute the true character of the expenditures.

Throughout its argument the petitioner refuses to recognize the true character of the Jason Clause. Thus, it is argued that obligations arising under the Jason Clause are, as to the "Sucarseco", *res inter alios acta.* This argument could just as well be made as to the bill of the shipyard which repaired the "Toluma". The "Sucarseco" could say with entire truth that it was not a party to the contract between the owners of the "Toluma" and the shipyard which repaired her. The answer to this argument,

however, is plain: the liability of the "Sucarcesco" for the cost of the "Toluma" repairs does not arise out of the contract between the "Toluma" owners and the repair yard, but out of the collision which caused the damage and necessitated the expenditure for repairs. This answer would be equally adequate, although it appeared that the "Toluma" owners had made an annual contract with the shipyard to repair all their vessels which might be damaged. The only question which the "Sucarseco" could raise under such circumstances would be the question whether the contract resulted in a reasonable liquidation of the damages. So, too, the only question which arises in connection with expenditures made pursuant to the Jason Clause, is the question whether such expenditures are reasonable. In this case, however, this question is covered by the stipulation of facts, which shows that the expenses in question here were proper general average expenditures, and that the amount in dispute was the cargo's fair and equitable share of these expenses.

The master's authority to incur expenditures or make sacrifices on behalf of cargo is, of course, subject to the qualification that where the shipowner is liable for the disaster out of which the necessity for the expenditure arises, the master will be deemed to act not as agent for the cargo owner, but as agent for the shipowner, in the performance of the latter's duty to minimize the damages resulting from his own fault. This, so far as we are aware, has always been true under the law of all maritime nations. Any other rule would merely result in circuity of action, as the owner of cargo who had paid a contribution in general average to the shipowner would immediately sue the shipowner to recover back the amount of his payment as part of his damages.

Prior to the passage of the Harter Act in this country, the question arose in England whether a provision in the

contract of affreightment exempting the carrier from liability for the negligence of his servants (this provision being valid under English law) gave the carrier the right to demand contribution from the cargo in respect of a general average rendered necessary by the negligence of the carrier's servants. It was held that as the carrier was no longer liable for the negligence of his servants, such negligence was no bar to his claim in general average. *The Carron Park*, 15 Prob. Div. 203. The same rule appears to have been adopted in France and Belgium (see dissenting opinion in *The Irrawaddy*, 171 U. S. 187, at pp. 199-200; see also, as to French law, petitioner's brief, appendix III, pp. 68-69).

The so-called Harter Act (Act of February 13, 1893, U. S. Code, Title 46, Ch. 8, Sec. 192) modified the law of the United States by providing that a shipowner who had used due diligence to make his ship seaworthy and to have her properly manned and equipped, should not be liable for damage to cargo resulting from negligence in the navigation or management of the ship. The question then arose whether a shipowner who was exempted from liability under this Act was entitled to contribution from cargo for general average sacrifices rendered necessary by negligence in navigation. This question came before Judge Addison Brown in the Southern District of New York in the case of *Chrystal* v. *Flint* (*The Irrawaddy*), 82 Fed. 472. Judge Brown sustained the shipowner's claim for contribution from the cargo saying:

> "* * * I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the ship owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation; and because it, therefore, seems necessarily to follow that in cases where all such liability is abolished by law, as it is

> under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average" (pp. 474-475).

Judge Brown cited the case of *The Carron Park*, *supra*, and followed the rule there laid down. On appeal (88 Fed. 987) the Circuit Court of Appeals certified the case to this Court, where it is reported as *The Irrawaddy*, 171 U. S. 187.

In considering the decision of this Court in the *Irrawaddy*, it is important to bear in mind precisely what questions were involved in that case. The claim against the cargo consisted of four items which are enumerated in the opinion of the District Court (82 Fed. 472-3). These items were (1) the salvors' compensation, (2) the value of cargo jettisoned, (3) the freight on the cargo jettisoned, (4) the damage to the ship's machinery in her efforts to float herself after the negligent stranding.

It appears from the statement of facts certified to this Court (171 U. S. 188) that the cargo interests had voluntarily paid their respective shares of the first and second items above mentioned. They did not question their liability for expenses incurred on their behalf, but refused to contribute to the shipowner's sacrifices. We mention these facts as showing that the decision in the *Irrawaddy* did not touch the question upon which the petitioner lays so much stress in the present case, *i. e.*, the liability of cargo to contribute to port of refuge expenses of a general average nature. It is plain from the facts of the *Irrawaddy* case that the cargo interests considered themselves clearly liable to pay their share of actual expenditures made to relieve the adventure from peril; and there is nothing in

the opinion of this Court to indicate that it took a contrary view. When these circumstances are considered it seems clear that the decision of this Court in the *Irrawaddy* does not support the petitioner's argument that in the absence of the Jason Clause in the "Toluma" bill of lading these respondents would not have been bound to contribute to the general average expenses incurred at Norfolk.

The actual decision of this Court in the *Irrawaddy* was that the Harter Act, although it exonerated the shipowner from liability for damages sustained by cargo as a result of negligent navigation, did not give him the right to claim any contribution from cargo toward sacrifices rendered necessary by such negligence. This Court declined to follow the rule laid down in the *Carron Park, supra,* and held that although the shipowner was no longer liable for his negligence, such negligence still constituted a bar to any claim against cargo for contribution to general average sacrifices. A dissenting opinion was filed by Mr. Justice Brown and Mr. Justice McKenna.

The situation which existed after the decision in the *Irrawaddy* was unsatisfactory both to shipowners and to owners of cargo. The decision was quite generally construed (as by the petitioner here) as meaning that cargo interests were not bound to contribute to any general average expenditures made by a shipowner following a disaster due to negligent navigation. Under these circumstances shipowners naturally would not incur any expenditures on behalf of cargo, but would call on the cargo owners to come forward and pay their own share of the expenses. Such an attitude on the part of the shipowners could not fail to result in great and sometimes serious loss of time. Even confining the *Irrawaddy* decision to its actual facts, the situation was obviously unsatisfactory. When a vessel stranded through negligence it might be entirely possible to float her by the use of her own power; but this might

result in serious damage to her machinery. If the master knew that the cargo owners need not contribute to any such damage, his natural course would be to call in salvors who would float the vessel and enforce their lien against both ship and cargo. This course might be very much more expensive and might involve dangerous delay.

In order to meet this situation and permit the master to act promptly on behalf of all concerned in the face of threatened disaster, the clause now under consideration was devised. The question of its validity came before this Court in the case of *The Jason*, 225 U. S. 32. The lower courts had held the clause invalid, but the Circuit Court of Appeals had later certified the case to this Court. This Court upheld the validity of the clause.

In support of their contention that the clause was invalid, the owners of the *Jason* cargo made precisely the same argument which the petitioner makes here, *i. e.*, that the sacrifices made and expenses incurred by the shipowner were made in fulfillment of his general duty as carrier and bailee; that he would have been bound to make these sacrifices and incur these expenses in any event; and, therefore, the effect of the clause was to relieve the shipowner of a liability from which he was not relieved by the Harter Act. In view of the insistence with which this same argument is urged in the present case, we desire to quote the language in which this Court answered it in the case of the *Jason*:

> "The argument is that although that act exempts him from the consequences of the negligent stranding, it leaves him still under the duty and obligation of caring for and preserving the cargo, after the stranding; that whenever the safety of the property entrusted to the shipowner is menaced, whether the peril be occasioned by *vis major* or by fault, and

> whether such fault be or be not of such character as to fall within the third section of the Harter Act, 'the master is nevertheless bound to exert every effort to save the property, and if he fail in this duty, his owners are liable to the cargo for the resulting loss'. If by 'every effort' is meant every *reasonable* effort, we see no occasion to question the soundness of the reasoning. But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. *In our opinion the master's duty as agent of the owner is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacrifices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo*"* (225 U. S. 54).

The Court then goes on to discuss the leading cases dealing with the shipowner's obligations after a disaster, and points out that they do not impose any obligation to sacrifice the shipowner's own money or property for the benefit of the cargo. Thus, in the leading case of *The Maggie Hammond*, 9 Wall. 435, 459, the rule is laid down that it is the duty of the master to transship the goods when the vessel is wrecked; but upon so doing "he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured".

The petitioner insists that if there had been no Jason Clause in the bill of lading, the shipowner would have had to incur the expenses at Norfolk just the same. It may be true that some of them would have had to be incurred; but they would not have had to be paid by the shipowner. He might very well have employed stevedores to take the cargo out of the vessel and let them exercise

---

* Italics ours.

their possessory lien as security for their payment. He could have notified the cargo owners to come forward and pay the expenses chargeable to their respective shipments, under pain of having them left at Norfolk subject to various liens for handling, storage, etc. The argument that the Jason Clause relieves the shipowner of a liability which would otherwise rest upon him was sufficiently answered by this Court in the *Jason*. The passage above quoted from the opinion in that case deals with this question clearly, specifically and finally; it would be useless for us to elaborate or paraphrase that language.

In considering the stipulated fact that the expenses here in controversy were of a general average nature, it must be borne in mind that such expenditures must be made "for the benefit of the whole adventure *and for no other purpose*",* as pointed out in *Ralli* v. *Troop* (*supra*, p. 22). In that same case this Court said:

> "In *The Mary*, in the District Court of the United States for the District of Massachusetts, Judge Sprague, a most eminent admiralty judge, held that a voluntary sacrifice, made for the general benefit of the whole adventure, and also for the particular benefit of the cargo, was not a subject of general average. 1 Sprague, 19" (pp. 407-8).

It follows necessarily that the petitioner cannot argue, consistently with the stipulated facts, that the expenses here in controversy were incurred by the shipowner wholly or partly for some purpose of his own.

The error which pervades petitioner's entire argument is the assumption that the loss which the respondents sustained was cast upon them by the Jason Clause. This assumption rests upon a plain negation of the stipulated facts. Since it is stipulated that the expenses in question

---

* Italics ours.

were general average expenses, it follows that they were incurred to avert or minimize a greater loss. It results, therefore, that instead of casting a loss upon these respondents, the Jason Clause was the means of reducing or minimizing the loss which they would otherwise have sustained. If the master had not put back to Norfolk and the "Toluma" had sunk, these respondents would have sustained a total loss of their cargo; and this total loss would have been clearly recoverable from the "Sucarseco". How can it be argued seriously that the "Sucarseco" is not liable for expenses reasonably incurred by the respondents (through the master of the "Toluma" as their agent) to avert such a loss?

We deem it unnecessary to discuss at length "the rule of remoteness" upon which the petitioner relies. In connection with this rule the petitioner cites *Robbins* v. *Flint*, 275 U. S. 303, and similar cases. Such cases are readily distinguishable from the present case. All of those cases dealt with secondary damages sustained by the plaintiffs as a result of *injuries to the person or property of someone else*, that is, losses suffered by reason of interference with the profitable enjoyment of contracts. Such damages are held to be secondary and too remote to be regarded as legal damage for which the law will allow a recovery.

In *Robbins* v. *Flint* the claim was for injuries to the libellant's profitable enjoyment of a charter, although the vessel actually damaged was not owned by him or in his possession; and damages had been collected by the owner. In *Federal No. 2*, 21 F. (2d) 313, the claim was for reimbursement of an employer for amounts for which he was liable under a contract of employment to an employee on account of personal injuries. The physical injury, of course, was to the employee and not to the employer. In the case of *Insurance Company* v. *Brame*, 95 U. S. 754, the claim was by a life insurance company for reimbursement for sums which it had paid under a contract of life insurance. The act giving a cause of action for death

conferred this right only on certain relatives of the deceased.

The circumstances here are very different. Here, as a result of the negligence of the tort feasor ("Sucarseco"), the "Toluma" was so seriously damaged at sea that it was dangerous for her to proceed and her master decided that it was necessary for her to seek a port of refuge. The danger which threatened was not merely a danger to the ship, but to the cargo as well. In other words, the property *of these respondents* was placed in jeopardy; and it became necessary to make expenditures on behalf of these *respondents, for the protection of their own property.* If the master of the "Toluma" had failed to seek a port of refuge and had attempted to continue the long voyage on which the "Toluma" was bound, there was grave danger that the vessel and cargo would have been totally lost. No one questions the judgment of the master in seeking the port of refuge and consequently in incurring the expenses and losses which have been apportioned in general average and which are the subject of this litigation. These expenses and losses were incurred by the act of the master, acting as agent for all concerned, for the purpose of avoiding greater loss and minimizing the damage caused by the collision. All parties have agreed that these items of damage "are deemed to have been *caused by the collision* and to be provable, proved and allowed in this consolidated cause" (R., p. 28, paragraph 2).

Comparing the cargo owners' liability for general average contribution to the liability of an underwriter or a surety, may be a convenient method of illustrating certain aspects of the obligation; but if applied generally the analogy is very misleading. Petitioner relies upon the following passage from the decision of the Circuit Court of Appeals in the case of *Pool Shipping Co., Ltd.* v. *United States,* 33 F. (2d) 275, 277:

"The obligation of the cargo to contribute to the

> sacrifice made in the common interest amounted to an involuntary insurance for the benefit of the hull. The *Apache* was primarily liable and the indemnifying cargo to the extent of its contributive obligation was secondarily liable. The latter was, therefore, in the position of a surety and entitled to subrogation" (Petitioner's Brief, p. 55).

The Circuit Court of Appeals in the present case has repudiated the construction which the petitioner puts upon this language (*supra*, pp. 14, 15). That it is misleading if applied generally is apparent. Insurance is concerned only with payment for losses which have already occurred; general average is concerned primarily with averting a loss which is threatened. In this connection we quote as follows from the Fifth Edition of Gow on Marine Insurance (pp. 286-7):

> "The late Mr. Richard Lowndes, a past-master in all matters connected with this subject, remarked in the preface to the second edition of his classical work, *The Law of General Average*, 1874, that the subject of general average can never be as well understood as when it is studied apart from insurance, 'with which it is only accidentally associated, and as an outlying branch of the law of affreightment to which it naturally belongs."

The analogy of suretyship is even more misleading. If the cargo owner is a surety, he is surety for the third party *tort feasor* who has brought about the loss. If this extraordinary relation were established, it would seem that the surety, having paid the obligation of the principal, would be entitled to sue the principal for reimbursement; but this is just what the petitioner claims he cannot do.

That the cargo owners' rights do not rest upon the doctrine of subrogation is demonstrated by one of the

authorities upon which the petitioner chiefly relies. We refer to the decision in *Ralli* v. *Societa Anonima*, 222 Fed. 994. In that case, as the opinion clearly states, the non-carrying vessel sustained the greater damages; when the balance was struck, the carrying vessel was a debtor, and actually paid out money to the non-carrying vessel. Accordingly, if the rights of cargo interests in respect of their general average contributions depended on the doctrine of subrogation, they would have recovered nothing; for the carrying vessel, to whose rights the petitioner insists cargo was subrogated, had no right of recovery but a liability—an actual balance to pay. The petitioner itself (p. 54, Petitioner's Brief) cites the following passage from the decision of this Court in *Phoenix Insurance Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 321:

> "In any form of remedy the insurer can take nothing by subrogation but the rights of the assured."

Nevertheless, Judge Mayer held that cargo interests were entitled to receive from the carrying vessel one-half of their contributions to all general average expenses with which that vessel had been credited in the collision suit. Would anyone suggest that an underwriter on a vessel which was damaged in a collision due to mutual fault was entitled to receive back from his assured any part of the loss paid under the policy, when the assured had actually recovered nothing but, on the contrary, had an actual balance to pay? And yet, the case of *Ralli* v. *Societa* is repeatedly cited throughout petitioner's brief in support of the "subrogation" theory.

POINT IV.

The general average nature of the expenses here in controversy is not derived from the Jason Clause but exists quite independently of that clause. In any event a third party tort feasor is not concerned with this question but only with the question whether the expenses were reasonably incurred to save the cargo from greater loss.

At page 53 of its brief the petitioner says:

> "That a part of these several items constituted expenses of a 'general average nature' was so, because of the contract between the Petitioner and the Respondents."

As we have already pointed out (*supra*, p. 29), the Jason Clause is merely an agreement to pay general average expenses for which the cargo would be liable in the absence of negligence, and does not alter or enlarge the class of expenses to be treated as general average expenses. The statement above quoted, therefore, leads to an absurdity. We agreed to pay these expenses because they are general average expenses; but (the petitioner says) they are general average expenses because we agreed to pay them. If the statement above quoted stood alone we should not discuss it seriously, but it is merely one illustration of a line of thought which is suggested throughout the petitioner's brief. The petitioner repeatedly speaks of "the maritime law of General Average" as of something fixed and immutable. These references are strongly reminiscent of the "mystic over-law" which this Court declined to recognize in the case of *The Western Maid*, 257 U. S. 419, 432. The implication of petitioner's argument appears to be that any attempt, in the contract of affreightment, to express, define or modify "the maritime law of General Average", destroys the integrity of this

mysterious and fragile code, and renders it wholly inoperative.

In answering this line of argument it becomes necessary to discuss briefly the basis and scope of the law of general average, and the sources from which it derives its authority. The origin of the system of rules to which the petitioner refers as "the maritime law of general average" is lost in the mists of antiquity; it undoubtedly antedates the Christian Era. Introduction to Lowndes, General Average, 6th Edition. Even the etymology of the word "average" as used in the phrase "general average" is unknown. Gow, Marine Insurance, 5th Edition, page 287. One of the authorities refers to it as "an unintelligible symbol". Maclachlan's Law of Merchant Shipping, 6th Edition, page 561. It seems clear that the word originally carried none of the significance of the modern English word "average". It related to the loss and not to the method of apportioning it. This is confirmed by the use of the same word in the phrase "particular average" to describe a partial loss or damage to which there is no contribution. Phillips on Insurance, Vol. 2, Sec. 1269, page 60. We think it is important to bear in mind that the term "general average" (or "common average" as it is expressed in French law)* does not refer to a method of adjustment, but to a loss which falls upon the entire adventure. The loss is general or common at the time it occurs; it does not become so by virtue of the adjustment and settlement.

The question whether the law of general average rests upon an implied contract has been much discussed, but never definitely settled. In *Ralli* v. *Troop*, this Court said that the authority of the master

> "may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet

---

* See Code de Commerce, Sections 399 to 401, as set out in Lowndes, General Average, 6th Edition, Appendix K, pages [illegible].

509-54

> the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care" (157 U. S. 386, 397).

It has never been doubted, however, that the rules for applying the principles of general average (although not the principles themselves) may properly be the subject of express agreement among the parties concerned. These rules have also been extended and modified to meet new and changing conditions.

In its earliest form the law of general average applied only to very few cases; perhaps only to the jettison of cargo. During the Middle Ages, if not sooner, the principle was extended to a number of other cases, such as the cutting away of a mast and the payment of ransom to pirates. In the Ordonnance of Louis XIV, in 1681, we find a statement of the general principle that all "extraordinary expenses" incurred, and damage suffered for the common good and safety of the merchandise and the vessel, are gross and common average". Lowndes, General Average, 6th Edition, page 16. In modern times the principles of general average have been applied to a great number of new situations which arise naturally out of the complexity of modern affairs. This extension in the scope of the law, however, has not involved any deviation from the principles upon which the system originally rested. As this Court said in *Ralli* v. *Troop, supra*:

> "In the courts of England and America, general average has not been restricted to the cases put by way of illustration in the Rhodian and Roman laws; but it has never been extended beyond the spirit and principle of those laws" (p. 394).

The statement above quoted shows that the law of general average has a dual aspect. The general principles upon which the system rests are fixed and are not subject to change. We find them in the law of England and of the

United States today in the same form in which they existed in the Rhodian and the Roman law. The application of these principles, however, has expanded with experience and with the commerce of the world. Moreover, as ocean commerce developed, the application of these principles involved more numerous and more difficult problems. In the interest of convenience and uniformity, efforts were made from time to time to codify the rules of adjustment: sometimes by legislative enactment and sometimes by private agreement. In the latter class are the York Antwerp Rules, as originally promulgated and as successively modified. The history and text of these Rules down to 1890 will be found in an appendix to the 6th Edition of Lowndes, General Average (p. 803). A similar discussion of the 1924 revision of these Rules is contained in a work published by Mr. George R. Rudolf in 1926, entitled "The York Antwerp Rules". The text of this latest revision is printed as a supplement to the American Maritime Cases for 1925. For many years it has been customary to incorporate these Rules by reference in ocean bills of lading, as was done here (see Clause 12 of Bill of Lading quoted on p. 4 of Petitioner's Brief).

It will scarcely be argued that the York Antwerp Rules have changed the essential character of the system of law which they undertake to codify. The petitioner does seem to contend, however, that if a shipowner who would not otherwise be entitled to receive a contribution in general average is granted that right in the contract of affreightment, the contribution which he receives is not general average in the true sense of the term. This is the only meaning we are able to attach to petitioner's complaint that in the decision below

> "the distinction between an obligation imposed by law [*i. e.*, the maritime law of General Average] and an obligation arising only by contract [agreement of the parties to the incorporation of the

Jason Clause] is not recognized, nor applied" (Petitioner's Brief, pp. 26-27).

If there is any such distinction as the petitioner suggests, then there can be no true general average excepting in cases where the danger arises from an act of God or a public enemy; for these are the only perils for which a common carrier is not liable at common law. As to all other perils, the common law makes him an insurer; and the exemption which common carriers have enjoyed since long before the Harter Act (excepting as to the negligence of themselves and their servants) is based entirely on stipulations in the contract of affreightment. Consequently in all such cases the shipowner could not claim contribution in general average except for the existence of such stipulations, as he would otherwise be liable for all damages and expenses resulting from the accident.

In the case of *The Energia, supra*, the cargo was liable for general average under English law, which applied at the port of destination, only because the bill of lading contained a clause (valid under that law) exempting the shipowner from liability for the collision. This clearly appears from the opinions in that case.

The same is true of the case of *The Minnetonka, supra*. Even under English law, of course, a shipowner cannot recover general average contribution in respect of a loss for which he is liable.

> *The Carron Park, supra;*
> *The Minnetonka* (1905) Prob. Div. 206, 213, 214.

To test the petitioner's theory, let us suppose that in the present case the "Sucarseco" had been solely at fault; but that the "Toluma's" call at Norfolk was a departure from the normal course of her voyage (as to the New York cargo) and would have rendered the petitioner liable as an insurer excepting for the customary clause in the "Toluma's" bill of lading, giving her the privilege of de-

viation. *S. S. Willdomino* v. *Citro Chemical Co.*, 272 U. S. 718, 725. Would the petitioner say that the contribution paid by the New York cargo was not truly general average because if the rights of the parties had been governed by "the general maritime law" the petitioner would have been liable as an insurer and, hence, precluded from making any claim in general average? It would be most extraordinary if the liability of the "Sucarseco" should depend on the presence or absence of a deviation clause in the "Toluma's" bill of lading; and yet this would seem to be the logical result of the petitioner's argument.

The truth of the matter is that the question of antecedent fault or negligence has nothing whatever to do with general average as such. An act can only constitute a general average sacrifice if it complies with certain definite requirements. These requirements have been thoroughly understood and well settled for thousands of years. One of the requirements is that the act must be done to save the whole adventure from impending peril; but it is quite immaterial (in determining the general average character of the act) whether or not the peril was caused by some antecedent negligence. Such negligence may preclude one or another of the parties to the adventure from receiving what would otherwise be due to him as a result of the sacrifice; but it does not alter the fact that the sacrifice was a general average act. This was pointed out by Judge Addison Brown in *Chrystal* v. *Flint* (*The Irrawaddy*). He says:

> "In this country and in England it has been held that the mere fact that the common peril arose by bad navigation, or bad management of the ship, or that a remedy in damages therefor may exist against the ship owner, does not prevent recovery of general average compensation by a cargo owner against the ship and against other cargo owners for

his sacrifices made for the common benefit." 82 Fed. 475.

In the last analysis, the "Sucarseco's" liability for the amounts which these respondents contributed to the expenses at Norfolk does not rest upon the fact that they are general average expenses; but upon the fact that these expenses were necessarily incurred for account of these respondents in saving their property from a peril to which it had been exposed by the "Sucarseco's" negligence. The law of general average enters into the case only because it affords a convenient method by which shippers may arrange in advance to have their property protected in time of peril, and have their share of the necessary expenses fairly determined. The same result might have been accomplished without reference to the law of general average. The parties might have agreed that there should be no general average, but that some third party should intervene, in a situation of impending peril, and make whatever expenditures were necessary; and that these expenditures should be apportioned over the values involved. In such a case, just as in the present case, the "Sucarseco's" only concern with the agreement would be to determine whether it was a fair and reasonable method of accomplishing the result.

A very similar situation was actually presented in the case of *The Minnetonka, supra,* where the court said:

> "It seems to me that the only consideration is whether the compromise was reasonable—whether it was a reasonable way of adjusting the sum for which the wrong-doer was liable—and that the simple process of assessment does not break the chain of causality" (1905 Prob. Div., p. 215).

The law of general average is merely a set of rules to govern the conduct of a common agent in dealing with the

property of numerous absent principals in time of peril. These rules are the outgrowth of many centuries of experience. It has been found that they result in a fair distribution of the cost, in money or property, of saving a maritime adventure from imminent peril. As a matter of convenience the parties to such an adventure prefer to have their relations governed by these rules, rather than to attempt to formulate a special agreement in each case as to what shall be done in time of danger.

In ancient times merchants commonly accompanied their goods and took part in the consultation which preceded any sacrifice or expenditure. If they could not agree, the matter was sometimes settled by majority vote,—*i. e.*, by a primitive form of arbitration. Lowndes, General Average, 6th Ed., pages 6 to 9; also note (t) on page 9. When merchants ceased to sail with their goods the master, of necessity, became sole arbitrator; and rules were formulated, from time to time, for his guidance in the performance of this duty. The fact that his principals are no longer present does not alter the nature of his act. He is still disposing of their property with their consent, the only difference being that the consent has been given in advance instead of after the danger has arisen.

From the standpoint of a third-party *tort-feasor* who has created the danger, the ultimate question is not whether the sacrifice or expense is technically of a general average character, but whether it was reasonably necessary in order to avert the danger. As to such a third party, the fact that expenses are properly allowed in general average (as stipulated to be the case here), is merely a convenient form of proof that they were properly incurred and fairly apportioned. His liability, however, does not arise from the law of General Average, but from his own tort. We may suppose a case where collision rendered it imperative to jettison a deck-load, for which no contribution was due (Lowndes, General Average, 6th Ed., p. 61); clearly the

colliding vessel, if at fault, would be liable for the cargo jettisoned, although it was not technically a general average sacrifice. Let us vary the case by assuming that the deck-load consisted of timber, and that the master arranged with third parties to raft it to destination. Clearly the colliding vessel would be liable for this expense, although it involved no general average feature whatever.

The foregoing illustrations show that the law of general average does not enter into the liability of the "Sucarseco" excepting as a convenient method of apportioning the damages. This was pointed out, with his usual clarity, by Judge Addison Brown in the *Energia, supra.* As an expression of our thought, we cannot improve upon the following paragraph in his opinion:

> "A charge paid for a salvage service, made necessary by a collision, is strictly analogous to the present claim, so far as respects its directness; and the charge for salvage is always allowed as an item of damage against the ship in fault. *The Ackerman,* 8 Ben. 496; *The Fletcher,* 42 Fed. 504; *La Champagne,* 53 Fed. 398. It might as well be claimed that the law of salvage was in such a case the cause of the salvage charge, as that the law of average is the cause of the average charge against the cargo in a case like this. It is not the law, but the facts and the relations which the law recognizes, that are the causes and the grounds of the average charge" (61 Fed., at p. 224).

POINT V.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

D. ROGER ENGLAR,
Counsel for Respondents.

LEONARD J. MATTESON,
Of Counsel.

New York, January 28, 1935.

No. 524.

APPENDIX TO RESPONDENTS' BRIEF.

ITEMS OF DISBURSEMENTS FROM GENERAL AVERAGE STATEMENT, INCLUDED IN PAR. 4 (a), STIPULATION, R. 29, PECULIARLY APPLICABLE TO CARGO.

Items	Page		
1-10	58-67	Stevedores' charges, discharging and reloading general cargo, coal, etc. at Norfolk	$16,918.72
27-29	76-79	Watching discharged cargo on pier	606.00
30-31	78-79	Transportation of stevedores, to discharge and reload cargo	374.90
38	82-83	Towing barges in connection with discharge and reloading of cargo	64.00
49	88-89	Wharfage and storage on cargo	537.60
55, 56	92-93	Insurance on cargo stored on piers	888.30
57, 58	94-95	Master's expenses unloading and discharging cargo at Norfolk	233.95
71	108-109, 110-111	Supplies for stevedores, loading and discharging cargo	195.87
		Total	$19,819.34
		Other items	16,009.11
		Total of all General Average Disbursements Recoverable as Collision Damage (Stipulation, Par. 4 (a), R. 29)	$35,828.45

N. B. In Appendix IV to Petitioner's Brief, dated Feb. 6, 1935, there is listed the following item:

"Item 87 Page 134 Interest on General Average disbursements $1,809.92."

This is not a correct description of item 87 which relates only to "allowance for overtime paid to members of crew $159.97."

The item of interest on general average disbursements is not included in the total of general average disbursements recoverable as collision damage amounting to $35,828.45 set forth in Stipulation Par. 4 (a), R. 29, this item having been omitted pursuant to agreement of the libellants to waive any claim for interest against the "Sucarseco" in this case prior to the date of the Stipulation of Agreed Facts (Stipulation, Par. 2, R. 28).

SUPREME COURT OF THE UNITED STATES.

No. 524.—October Term, 1934.

Aktieselskabet "Cuzco", as owner of the Norwegian Steamship "Toluma", Petitioner,
vs.
Steamship "Sucarseco", her Engines, Boilers, etc., Submarine Boat Corporation, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 4, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question in this case arises out of a collision at sea between the Norwegian vessel Toluma and the American vessel Sucarseco. Both vessels were at fault and both were damaged. The Sucarseco proceeded on her voyage. The Toluma put into a port of refuge for necessary repairs. To permit these repairs, a part of her cargo was discharged; it was later reloaded and the Toluma completed her voyage. A general average statement was prepared which apportioned the expenses and losses, so far as they were of a general average nature, between the owner of the Toluma and the cargo owners.

Three suits were brought in admiralty and were consolidated for trial. One was a libel for damages brought by the owner of the Toluma against the Sucarseco. Another was a cross libel for damages by the owner of the Sucarseco against the Toluma. The third libel was by the owners of cargo on the Toluma against the owner of the Sucarseco to recover their damages, including the amounts which the cargo owners had paid as general average contributions.

The only question presented here is with respect to the claim of the cargo owners. Their right to recover against the Sucarseco, the non-carrying vessel, is not contested so far as the physical damage to the cargo is concerned. The contest is with respect to the contributions of the cargo owners in general average. The Circuit Court of Appeals, reversing the District Court, allowed that

recovery. 72 F. (2d) 690. Because of the importance of the question, which has not been decided by this Court, a writ of certiorari was granted, December 3, 1934.

There is no dispute that both vessels were seaworthy and that the collision was due to the fault in navigation of both vessels equally. No question has been raised as to the correctness of the general average adjustment. As, through the application to the instant case of the rule for the division of the entire loss equally between the vessels,[1] the ultimate share to be borne by the Sucarseco will not be affected by the determination of the present claim of the cargo owners, the Sucarseco is indifferent to the result and the claim is opposed by the Toluma.

The cargo was carried under a provision of the bill of lading, known as the "Jason clause", that in case "of danger, damage or disaster" resulting "from faults or errors in navigation", and if the shipowner "shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied", the owners of the cargo shall contribute with the shipowner in general average "to the payment of any sacrifices, losses or expenses of a general average nature that may be incurred for the common benefit" to the same extent as if the danger, damage or disaster had not resulted from faults or errors in navigation.[2] The clause is substantially to the same effect as the one sustained in the case

[1]See The North Star, 106 U. S. 17; The Chattahoochee, 173 U. S. 540.

[2]The applicable clause in the bill of lading is as follows:

"In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness".

of *The Jason,* 225 U. S. 32, and has received its popular designation from that decision. Petitioner contends that the liability of cargo to contribute in general average results solely from this provision in the contract of carriage; that the owners of the Sucarseco were not parties to that contract; and that the claim of the cargo owners for the refund of their general average contributions is derivative and not directly recoverable from the Sucarseco, the cargo owners being entitled only to an accounting from their carrier (the Toluma) for their ratable proportion of that carrier's recovery. Respondents insist that cargo's contributions in general average are a part of cargo's "collision damage" and are recoverable from the Sucarseco as a tortfeasor in the same manner as physical damage.

While the damages due to a collision, when both vessels are at fault, are divided as between themselves, the innocent cargo owner may recover his full damages from the non-carrying vessel. *The Atlas,* 93 U. S. 302, 315; *The New York,* 175 U. S. 187, 209, 210; *Canada Malting Co.* v. *Patterson Steamships,* 285 U. S. 413, 418. This is so, although the carrying vessel may be free from liability to the cargo owners by reason of the application of section three of the Harter Act, 46 U. S. C. 192.[3] On a division of the entire damages between the two vessels, the non-carrying vessel may recoup one-half of the amount paid to the cargo owners. *The Chattahooche,* 173 U. S. 540, 554, 555. The direct liability of the non-carrying vessel "for all the damage to cargo" is "one of the consequences plainly to be foreseen", and the responsibility of the carrying vessel to the non-carrying vessel is measured accordingly. *Erie Railroad Co.* v. *Erie & Western Transportation Co.,* 204 U. S. 220, 226.

In the stipulation of facts, the parties agreed that the expenses, for which recovery is now sought as a part of cargo's damage, were "of a general average nature". The description is brief but adequate. It is a description which incorporates the essential conditions of general average. It means that there was a common imminent peril and a voluntary sacrifice or extraordinary expenses necessarily made or incurred to avert the peril and with a resulting common benefit to the adventure. *Columbian Insurance Co.* v. *Ashby,* 13 Pet. 331, 338; *McAndrews* v. *Thatcher,* 3 Wall. 347,

[3]Act of February 13, 1893, c. 105, 27 Stat. 445.

365; *Star of Hope,* 9 Wall. 203, 228, 229; *Ralli* v. *Troop,* 157 U. S. 386, 394, 395, 403; *The Jason, supra,* pp. 48, 49. It means that the sacrifice or expenses fell upon the whole adventure and were to be assessed in proportion to the share of each in that adventure. *Star of Hope, supra; Ralli* v. *Troop, supra.* This is the basic consideration in determining the present question.

Prior to the Harter Act, a common carrier by sea could not exempt himself from liability to the cargo owner for damages caused by the negligence of master or crew. *Liverpool Steam Company* v. *Phenix Insurance Company,* 129 U. S. 397. The Harter Act, prohibiting by sections one and two agreements with a shipowner which would relieve him from responsibility for the proper loading, stowage, custody, care, or delivery of the cargo, or from the duty to exercise due diligence to make the vessel seaworthy, provided in section three that if the shipowner did exercise due diligence "to make the vessel in all respects seaworthy and properly manned, equipped and supplied", neither the vessel nor her owner should be responsible for damages resulting "from faults or errors in navigation or in the management of the vessel". The question then arose whether a shipowner who had exercised that due diligence was entitled to general average contribution for sacrifices made by him, subsequent to a stranding of his vessel, in successful efforts to save vessel, freight and cargo. That right was denied the shipowner in *The Irrawaddy,* 171 U. S. 187. The point of that decision was carefully stated in *The Jason, supra,* p. 54. The Court there said that the authority of *The Irrawaddy* went no further than that "while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence". But, as the Harter Act had relieved the diligent shipowner from responsibility for the negligence of his master and crew, the Court decided in *The Jason* that it was "no longer against the policy of the law" for him to contract with the cargo owners "for a participation in general average contribution growing out of such negligence". Upon this ground, the validity of the "Jason clause", similar to the one now before us, was upheld.

What then is the effect of the "Jason clause"? It in no way changes the essential features of general average contributions.

It must still appear that voluntary and successful sacrifices have been made or extraordinary expenses incurred on behalf of those interested in the adventure in order to avert a common imminent peril, with resulting benefit to the adventure upon which the burden of such sacrifices and expenses appropriately rests. As the master of the ship is charged with the duty, and clothed with the power, to determine at the time "whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder", the effect of the "Jason clause" is to invest the master with authority and responsibility to act directly for cargo in relation to cargo's duty to contribute in general average. The master becomes for that purpose the representative of cargo. *Lawrence* v. *Minturn*, 17 How. 100, 109, 110; *Star of Hope*, 9 Wall. *supra*, p. 230; *Ralli* v. *Troop*, *supra*, pp. 397, 398; *The Gratitudine*, 3 C. Rob. 240, 257, 258, 260; *Burton* v. *English*, 12 Q. B. D. 218, 223. In *The Jason*, *supra*, p. 54, the Court pointed out that as sacrifices and expenses, in order to justify the general average contribution, must be voluntary and extraordinary, they could not be regarded as made in the performance of the general duty of the shipowner to his cargo. The "Jason clause" was sustained because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility. *Id.*, pp. 55, 56.

It is with this understanding of the effect of the clause that we come to the question as to the right of the cargo owners to include, in the damages they have suffered by reason of the collision, their general average contributions. That the extraordinary expenses, thus shared, were due to the collision cannot be gainsaid. It is because they were thus directly caused, that these expenses form part of the damages to be divided between the two vessels. On this basis they were included in the decree for division made by the District Court and the propriety of the inclusion of these amounts in the total damages to be divided between the vessels is not questioned. But the right to that inclusion springs directly from the tort and in that relation no question is raised as to proximate cause or foreseeable consequences.

The nature of these expenditures and the fact that they are traceable directly to the collision are not changed by the sharing